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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-454

CALVIN LOUIS BRANNON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The North Carolina Court of Appeals, at 25 N. C. App. 635, 214 S.E. 2d 213 (1975), found "no error" in Calvin Brannon's trial for larceny of the Gunter dogs. Calvin Brannon petitioned the Supreme Court of North Carolina for a Writ of Certiorari in the North Carolina Court of Appeals and also purported to appeal as of right from the Court of Appeals' decision pursuant to N.C. G.S. §7A-30(1). Upon answer by the Attorney General for the State of North Carolina, the Supreme Court of North Carolina dismissed the appeal and denied the petition for Writ of Certiorari on June 26, 1975. This decision is reported in 287 N.C. 665, ... S.E. 2d ..... (1975).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. IS PETITIONER'S CONTENTION THAT THE STATE OF NORTH CAROLINA VIOLATED THE DOCTRINE OF "FRUIT OF THE POISONOUS TREE" BY ALLOWING THE SEIZED LEASH INTO EVIDENCE GROUNDLESS IN VIEW OF THE ACTUAL CIRCUMSTANCES OF THE SEARCH AND SEIZURE?

2. IS THE PETITIONER'S CONTENTION THAT THE SEARCH WARRANT USED IN THIS MATTER IS FATALLY DEFECTIVE DUE TO A TECHNICAL ERROR ON THE AFFIDAVIT MERITLESS?

3. EVEN IF PETITIONER WERE ALLOWED TO ATTEMPT TO IMPEACH THE FACTUAL AVERMENTS IN THE AFFIDAVIT FOR THE SEARCH WARRANT, WOULD THE AFFIDAVIT STILL SUPPORT A SHOWING OF PROBABLE CAUSE?

STATEMENT OF THE CASE

On January 11, 1973, Petitioner was tried in Forsyth County District Court on two charges of larceny of dogs. Petitioner pleaded not guilty, but was found guilty as to both charges. The warrants were consolidated for judgment and Petitioner was sentenced by the Honorable Robert K. Leonard, District Judge, to imprisonment for eighteen (18) months in the jail of Forsyth County. Petitioner appealed his convictions to the Forsyth County Superior Court where on June 4, 1973, he was given a trial *de novo* on the two charges. The Petitioner again entered pleas of not guilty, but was found guilty by a jury on both charges.

Petitioner appealed his conviction to the North Carolina Court of Appeals which, in a decision reported in 21 N.C. App. 464, 204 S.E. 2d 895 (1974), reversed his conviction as

to one charge, and granted a new trial in the matter now before the Supreme Court.

Petitioner was retried in Case 72CR47396. On July 25, 1974, Petitioner filed a motion to suppress certain evidence seized on October 22, 1973, by law enforcement officials. A *voir dire* hearing on the motion was heard on August 23, 1974 before the Honorable James Exum, Regular Judge of the Superior Court of Forsyth County. After the hearing, Judge Exum made findings of fact and conclusions of law and denied the Petitioner's Motion to Suppress.

On September 16, 1974, the Petitioner was tried, upon a plea of not guilty, for larceny of dogs in Case 72CR47396, and was again found guilty by a jury, and sentenced to a term of eighteen (18) months in the State Department of Correction. Petitioner appealed his conviction to the Court of Appeals which found "no error" in a decision dated May 7, 1975, and reported in 25 N.C. App. 635, 214 S.E. 2d 213 (1975). A petition to the Supreme Court of North Carolina for a Writ of Certiorari in the North Carolina Court of Appeals was denied and a direct appeal to the Supreme Court of North Carolina was dismissed on June 26, 1975, in a decision reported in 287 N.C. 665, ... S.E. 2d ..... (1975).

From this dismissal, Petitioner has filed the present petition for Writ of Certiorari to the Court of Appeals of North Carolina in the Supreme Court of the United States.

RELEVANT FACTS

In early September, 1972, Mr. George Gunter saw Calvin Brannon in the Gunter dog lot with chains around two dogs. When Gunter jumped out of his truck, Calvin Brannon jumped over the dog pen fence and ran away (R pp 9, 25). On the basis of this incident, George Gunter swore out a warrant in Forsyth County September 26, 1972, against Calvin Brannon charging him with attempted larceny of dogs (R p 9). As of October 21, 1972, this warrant had not been served on Calvin Brannon (R p 7).

On October 21, 1972, George Gunter and his Brother Charles, put three dogs, one belonging to George and two belonging to Charles, in the dog box of a pick-up truck in preparation for some hunting (R p 24). One of the dogs had a homemade leash, made by Charles, fastened to its collar (R p 24).

After placing the dogs in the dog box (about 7:30 p.m.), the Gunter brothers went inside George Gunter's house to have some coffee and change clothes (R p 24). When the brothers went back outside, the dogs were gone (R p 24). Charles Gunter had seen Brannon's car in the vicinity of George Gunter's home just before the theft (R pp 8, 13).

George Gunter notified Deputy Sheriff Weaver of the Forsyth Sheriff's Department of the theft and of his brother's sighting Brannon in the area (R p 8). Deputy Weaver and Gunter then went to East Spencer where they contacted the Chief of Police, Paul Wilson, who had been investigating Brannon due to other complaints about missing dogs and Calvin Brannon (R p 18).

Later that evening, Mr. Gunter, Deputy Weaver and Chief Wilson went to the home of Hattie Brannon (petitioner's mother) where Calvin Brannon sometimes lived (R p 10). Upon arriving at the home, the officers asked for Calvin Brannon. Mrs. Brannon said he was not there. The officers asked if they could look for Mr. Brannon, and Mrs. Brannon gave them permission and assisted in letting the officers in her home (R pp 10, 17). This search of the premises did not result in the finding of Calvin Brannon. However, while looking for Brannon in the area of Brannon's car, Deputy Weaver noticed some leashes—one resembling the leash made by Charles Gunter—in the trunk of Brannon's car (R p 12). These leashes were plainly visible due to a "a breathing hole made for breathing purposes where a dog or person could breathe. Looked like it had been jacked or prized open where they could get air through the car itself. The hole was of sufficient size that you

could see from outside into the trunk." (R p 20). George Gunter then looked at the leash through the hole in the trunk and stated that it resembled his brother's leash (R p 28). Deputy Weaver then opened the trunk to seize the leash, but Chief Wilson insisted upon getting a search warrant first (R p 16). By the time Wilson came back from Salisbury with this warrant, Calvin Brannon. who had been spotted coming out of some woods behind his Mother's home, had been detained (R p 19). Chief Wilson placed Brannon under arrest for attempted larceny of dogs and warned him of his rights pursuant to MIRANDA v. ARIZONA, 384 U.S. 436 (1966). Then, *before telling him about the search warrant*, but just after he had been warned of his rights, Chief Wilson requested permission from Calvin Brannon to search the automobile (R p 20). This permission was granted, Brannon saying "go ahead, lets do it. Open it up. Do what you want to do" with Brannon actually assisting in the search (R p 22). Brannon's sister testified that he was handcuffed at the time, but Chief Wilson testified, "I don't believe he was handcuffed on the street because he helped unlock the trunk and was there when we unlocked the trunk, but I don't recall." (R p 22). This consent of Brannon's was later denied—not by Brannon, who did not testify on *voir dire*—but by his sisters who were present during some of the arrest and search. The leash found in the trunk was positively identified by George Gunter as his brother's leash (R p 26).

REASONS FOR DENYING THE WRIT

I.

THE SEARCH AND SEIZURE COMPLAINED OF IN THIS MATTER WAS LEGAL; THEREFORE THE FRUIT OF THE POISONOUS TREE DOCTRINE IS INAPPLICABLE.

Calvin Brannon, the Petitioner herein, has mounted a multifaceted attack on the search conducted on the premises of his mother's home on October 22, 1972, which resulted in the

seizure of highly incriminating evidence against him. He claims that the "fruits of the poisonous tree" doctrine of WONG SUN v. UNITED STATES, 371 U.S. 471 (1963) precludes the use of this evidence. However, when the facts as elicited during the voir dire in this matter are examined, it is clear that the decision of the North Carolina Court of Appeals does not conflict with any decisions of this Supreme Court.

Petitioner first alleges that the police had no right to search incident to a lawful arrest, because the arrest warrant the police possessed was void for lack of probable cause. In support of his argument Petitioner relies on GIORDENELLO v. UNITED STATES, 357 U.S. 480 (1958), and WHITELEY v. WARDEN OF WYOMING PENITENTIARY, 401 U.S. 560 (1971). However, Petitioner's reliance on these cases is inappropriate on the facts of the present matter. In WHITELEY, supra, the arrest warrant was found on the basis of the record not to support probable cause where the complaint consisted of nothing more than the complainant's conclusion that a burglary occurred and where the record showed that the complainant relied entirely on an informer's tip. The arresting officers had no independent probable cause aside from the warrant to arrest Whiteley. In the present matter, the complainant is the owner of the dogs and saw Brannon attempt the theft. Thus, he was acting on direct knowledge when he swore out the warrant. The arresting officers had sufficient independent corroborative evidence to support the arrest; the complainant was with the officers and both officers knew the details of Brannon's attempted larceny. Therefore, unlike the officers in WHITELEY v. WARDEN OF WYOMING PENITENTIARY, supra, the officers had sufficient probable cause to arrest on the attempted larceny matter aside from the warrant.

Even if the warrant were void, the law enforcement officers were still lawfully on the premises of the Brannon home because there was probable cause for the initial entry, consent for the initial inspection, initial discovery in plain view, and

ultimate seizure pursuant to a valid consent and warrant. Mr. Gunter's and his brother's dogs had just been stolen. Brannon, who had earlier been caught in Gunter's dog pen, was seen in the vicinity of the larceny shortly before the larceny, and Chief Wilson had Brannon under observation due to complaints about missing dogs and Brannon's apparent implication in these disappearances. These facts certainly constituted probable cause for the law enforcement officers initially to investigate Brannon in connection with the theft of the Gunter dogs, and provided a valid reason for the officers to go to the Brannon residence separate and apart from serving the warrant for attempted larceny.

When Deputy Weaver and Chief Wilson got to the Brannon home, Mrs. Brannon clearly consented to the officers' search of the premises for Calvin Brannon who she said was not home. A search authorized by consent is, of course, wholly valid. ZAP v. UNITED STATES, 328 U.S. 624 (1946) Both officers, the witnesses least likely to have a strong personal outcome in this matter, testified that Mrs. Brannon advised them that the officers could look for Calvin Brannon, and Chief Wilson testified that Mrs. Brannon assisted in letting them in the house (R p 17). There is no testimony on *voir dire* that the officers attempted to threaten Mrs. Brannon or her daughters, or asserted a legal right to search. They did not claim to have a search warrant or anything that would give them such authority; they merely stated they had an arrest warrant, a process that gives no authority to search on its face. Thus, Brannon's assertion that his mother's actions were mere acquiesence in a claim of lawful authority as found in BUMPER v. NORTH CAROLINA, 391 U.S. 548 (1968) is not based on fact. Further, it is not even consistent with the defense at trial for there, Mrs. Brannon testified that she did not give the officers permission to search at all (R pp 32, 33). Therefore, since Mrs. Brannon had consented to the search, when Deputy Weaver began looking into the petitioner's car parked in her yard, he was in a place where he had a

lawful right to be.

During the course of this inspection from outside the car, Deputy Weaver first ascertained that Brannon was not hiding in the seat of the car (R p 12). Then he noticed that the trunk lid "had a place bent up in it" (R p 12) through which he could plainly see into the trunk .When he looked into it, he saw many leather leashes, one of which matched the description Gunter had given to his brother's leash. Therefore, the leashes were not "fruit of the poisonous tree" since "[i]t has been long established that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." HARRIS v. UNITED STATES, 390 U.S. 234, 236 (1968). The applicability of this principle is unchanged by COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971). While it is true that the search itself was not inadvertent, the law enforcement officers were looking for Calvin Brannon, not making a general exploratory search for evidence and in the course of looking for the Petitioner, Deputy Weaver did inadvertently come across the evidence. This places the instant case within the holding of WARDEN v. HAYDEN, 387 U.S. 294 (1967).

After Mr. Gunter confirmed that the leash appeared to be his (R pp 12, 27-28), Chief Wilson got a search warrant from the Rowan County Magistrate. Before he returned to the Brannon home with it however, Calvin Brannon came out of the woods behind his mother's house whereupon he was placed under arrest and given warnings pursuant to the *Miranda* case. When Chief Wilson arrived, he asked petitioner for permission to search the car, which permission petitioner granted saying "Go ahead, open it. Do it. You can do what you want to." (R p 22). Only after being told this did Chief Wilson then inform Brannon that he also had a search warrant (R p 23). On these facts, the trial judge properly found that Calvin Brannon had consented to this search. Even though his consent was obtained after arrest and may be somewhat suspect

on this ground, the fact of arrest alone does not preclude a voluntary consent, for voluntariness "is a fact to be determined from all the circumstances," SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218 (1973).

Thus, Petitioner's claim that the introduction of the leash into evidence constituted a violation of the fruit of the poisonous tree is meritless. Both searches involved were sanctioned by the consent of either Brannon or his mother, and even if Brannon's consent was not considered not voluntary, the search warrant was based upon completely legal evidence supplied to the magistrate by Chief Wilson, and it alone permitted the search as well. Therefore, certiorari should not issue on the basis of this contention.

II.

THE AFFIDAVIT FOR THE SEARCH WARRANT IS NOT FATALLY DEFECTIVE.

The next allegation is that the search warrant was invalid since it was allegedly issued without a supporting affidavit. This assertion is based on the fact that the face of the affidavit recites it was sworn to at 1:30 P.M. although the warrant was issued at 1:30 A.M. However, the facts established on *voir dire* clearly indicate that the information was sworn to by Chief Wilson before the warrant was issued, and that the initials "P.M." were written by mistake. On this basis, the trial court found as a fact that the warrant was issued pursuant to the affidavit (Finding of fact 15 R p 42). Therefore, Brannon's assertion is simply factually incorrect in this regard and his reliance on AGUILAR v. TEXAS, 378 U.S. 108 (1964) is inappropriate. This contention involves only a peripheral inaccuracy which does not invalidate the warrant under either federal law, RUGENDORF v. UNITED STATES, 376 U.S. 528 (1964), or state law, N.C.G.S. 15-27(b) and does not warrant the issuance of writ of certiorari.

III.

THERE ARE NO FALSE STATEMENTS IN THE SEARCH WARRANT.

Of main interest legally in the instant writ is the question of whether or not impeachment of factual averments in an affidavit should be allowed. The North Carolina Court of Appeals indicated in its review of Petitioner's case that North Carolina continues to follow the majority rule of not allowing such impeachment, c.f. Mr. Justice White's dissent in NORTH CAROLINA v. WRENN, 417 U.S. 973 (1974). However, its statement in this regard was dictum and therefore of no consequence in this case. This is because the trial court allowed the impeachment to be made, but after hearing all the evidence, found the facts to be that the affiant had testified to the Magistrate truthfully and in accord with the averments set out in the affidavit for the search warrant (Findings of Fact 14, 15 (R p 42)). Therefore, Brannon's argument is really based on his feeling that Judge Exum should not have believed the testimony of the officers and Gunter on *voir dire*, and is not based on any credible showing of falsity with regard to the evidence on *voir dire*, or any prevention of an attempt to show such falsity. Under these circumstances, a writ of certiorari should not issue to review this matter.

CONCLUSION

For the foregoing reasons the State of North Carolina requests that the petition in the Supreme Court of the United States for a Writ of Certiorari to the North Carolina Court of Appeals be denied.

Respectfully submitted,

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